No. 92-1402

Supreme Court, U.S.
FILED
JUL 15 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT OF THE
STATE OF NEW YORK

BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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I. INTEREST OF THE *AMICUS CURIAE*

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers and remanufacturers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. State and local efforts to prevent the natural and economic movement of waste, whether for storage, treatment, disposal, or recycling, threaten the health of this industry. An increasingly common means to restrict the movement of solid waste is through flow control. "Flow control" is a short-hand reference to requirements imposed by state and local governments that municipal solid waste ("MSW") generated within or imported into its jurisdiction be sent to a designated facility for treatment or disposal. These facilities may include landfills, materials recovery facilities ("MFRs"), waste-to-energy ("WTE") plants, recycling facilities, transfer stations, or composting facilities. Flow control and "waste designation" are interchangeable terms. Because flow control obstructs the natural movement of solid waste, NSWMA's members are directly and adversely affected by flow control. Accordingly, they have a strong interest in presenting their views on the constitutionality of flow control.

Flow control jeopardizes the industries relying upon remanufacturing, hauling, treatment, and landfilling by denying to them the very materials they need to survive in some instances, or, at a minimum, to continue to meet the costs of complying with ever more demanding federal and state mandated environmental protection standards.

Thus, the interests of NSWMA are far broader than those posed by review of the flow control ordinance of the Town of

Clarkstown as applied to petitioners. Petitioners had transported for disposal out-of-state all wastes which they had received. They were barred from business, by operation of respondent's statute mandating that all the waste be processed in-state at the transfer station that respondent had designated. Petitioners' business clearly constitutes and is part of interstate commerce. NSWMA's members, however, do not always transport to or receive from out-of-state the solid waste and its components which are their life blood.

The purpose of this Amicus Curiae Brief is to establish that flow control of solid waste per force is in tension with and contrary to the dormant Commerce Clause, even were the flow control artfully drafted to adversely, albeit equally, affect most in-state and all out-of-state waste management service providers or were each provider physically located within the same state as the entity imposing flow control. This conclusion is premised upon the application of clear and longstanding precedents of this Court to the factual reality that in this day and age there is only commerce in solid waste, and not two separate subsets of commerce distinguished by whether a precise transaction at issue happens to involve a crossing of a state line.

II. SUMMARY OF ARGUMENT

Solid waste is part of the circle of commerce, beginning with the raw materials which are harvested, mined, and manufactured into articles which are in commerce, and which are thereafter discarded, sorted, recycled, and finally remanufactured yet again, regardless of whether each consecutive stopping point along the circle is serendiptiously located in different states. The collectors and transporters of solid waste, operators of waste treatment, storage, and disposal facilities, recyclers and remanufacturers are themselves not only participants in this circle of commerce, but also purchase, sell, transport, and finance in interstate commerce, and affect interstate commerce. Thus, solid wastes and those persons who rely upon it for their livelihoods are both "in" and "affecting" commerce, regardless of whether each person's hauling, disposal, or remanufacture falls solely within a single state.

Flow control cuts off this circle of commerce by imposing embargoes on solid waste so that it is retained only by a specific geographical entity; or by decreeing specific and limited resting places for the waste and its components, within specific geographical entities; or by taxing the waste either on export beyond the generating locality or on transport to undesignated facilities. By definition, flow control is economic protectionism.

Given the circle of commerce, no logic permits flow control to withstand Commerce Clause analysis, whether the flow control blocks commerce at town, city, or state borders.

When coupled with the findings of this Court, Congress, and the Executive Branch respecting the national crisis in waste disposal and emphasis upon recycling and remanufacturing of articles from solid waste, any flow control restriction breaking the circle of commerce violates the Commerce Clause. Such restrictions run afoul of the broad purposes served by the Commerce Clause, enunciated repeatedly in this Court's opinions involving commerce, including solid wastes, because flow control is both contrary to the core principle that our economic unit is the nation, and constitutes proscribed economic protectionism. In this regard, flow control is really nothing more than a derivative of the first generation of state enactments restricting the importation of solid wastes across state and local borders, which restrictions uniformly have been struck down by this Court. The sole distinction between the first generation and second generation of restrictions is that now the states and localities use flow control to retain for themselves their solid wastes instead of precluding the entry of solid wastes. This distinction is of no constitutional significance.

Flow control cannot stand when measured against those cases in which this Court has struck down export embargoes on Commerce Clause grounds, for a state or one of its political subdivisions may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the state, rather than through the state itself.

This Court previously has announced the principles necessary to decree flow control unconstitutional regardless of whether the blockage is at state boundaries. This Court has

interpreted most expansively the boundaries of federal power granted through the Commerce Clause to provide a basis for this Court's scrutiny of activities primarily and almost exclusively local in nature. This Court has repeatedly decreed that this broad encompassing of articles and activities implicating the Commerce Clause is equally expansive whether the Clause is applied to measure the constitutionality of federal statutory enactments or the validity of state and local laws. The "epoxy function" performed by the Commerce Clause and the monetary and environmental consequence of the circle of commerce in solid wastes to the national economy, health, and welfare are stymied by flow control which, as economic protectionism, is contrary to the core Commerce Clause principles which this Court has enunciated.

Application of these principles to the circle of commerce in solid wastes compels the conclusion that flow control violates the dormant Commerce Clause. A fortiorari it is respectfully submitted that petitioners must prevail in the above-referenced action.

III. ARGUMENT

A. *FLOW CONTROL RESULTS IN THE INEFFICIENT AND ENVIRONMENTALLY UNSOUND DISPOSAL OF OUR NATION'S WASTE*

Although NSWMA recognizes that the Court's decision in this case will turn upon the governing legal principles, state and local flow control measures such as that here at issue do not exist in a vacuum. Waste disposal is subject to regulation under both federal and state law, and the policies which underlie those regulatory schemes provide the background against which flow control should be evaluated. Accordingly, before addressing the applicable legal principals, NSWMA must discuss this background.

According to the Environmental Protection Agency, the United States generated 180 million tons of municipal solid waste in 1988. United States Environmental Protection Agency ("EPA"), The Solid Waste Dilemma: An Agenda For Action at 6

(1989). Fifteen million tons of solid waste move across state borders each year. See Interstate Transportation of Solid Waste: Hearings Before The Subcomm. On Transportation And Hazardous Materials Of The House Comm. On Energy And Commerce, 102nd Cong., 1st. Sess. 263 (1991) (Statement of Allen Moore, President, National Solid Wastes Management Association). All of it must be used or disposed. The EPA concluded that in 1988, more than half of the solid waste could be re-used: 40% of it was paper and paperboard; 8.5% was metals; 8% plastics; and 7% glass. United States Environmental Protection Agency, Characterization Of Municipal Solid Waste In The United States: 1990 Update, Executive Summary at ES-5 (1990). Yet, in 1988, only 13.1% of the 180 million tons of municipal solid waste were actually recovered. *Id.*, at ES-6, n.9.

To meet what Chief Justice Rehnquist has termed the "growing problem in our nation" regarding the sanitary treatment and disposal of solid waste [*City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (dissenting opinion)], Congress passed the Resource Conservation and Recovery Act, 42 U.S.C.A. §6901, *et seq*, which, after declaring that "problems in waste disposal . . . have become a matter of national concern" [42 U.S.C.A. §6901(a) (4)], found that municipal and solid wastes contain valuable material resources that can be reused, thereby conserving increasingly scarce virgin material, using available methods to recover millions of tons of reusable materials now needlessly buried each year. 42 U.S.C.A. §§6941(a) (2) & (3), 6901(c), 6902. These declarations of Congressional findings and objectives, spurred by financial assistance to those states adopting waste disposal plans including provisions for substantial reuse and recovery of materials from wastes, have spawned the growth of entire industries based solely on the transporting, remanufacturing, and marketing of newsprint and paper products, cans, glass, plastic, metals, and other materials obtained from wastes which had previously been buried or incinerated.

At the same time, the Act precluded the use of open dumps to dispose of wastes and instead compelled that landfills adhere to strict standards designed to ensure environmental safety, including the use of multiple layers of liners, leachate control systems, and engineering safeguards.

Although these strict standards significantly diminish environmental degradation caused by burial of solid wastes, they also change the economics of landfilling. These high technology landfills cost as much as $1 million per acre to construct. National Solid Wastes Management Association, The Effects Of Designation And District Fees On Solid Waste Management In Ohio at 3 (1993) (hereinafter "Ohio Report"). This simple economic reality has compelled the construction of larger landfills serving wider areas, in order to spread the huge costs of construction and compliance with ever more demanding federal and state regulations over an increased volume, thereby maintaining a reasonable and competitive fee for disposal of solid waste.

At the same time, geology, population pressures, zoning restrictions, limited local disposal capacities, and the development of low cost means to transport solid wastes over long distances have made it both necessary and economically feasible for many localities to dispose of their solid wastes in far distant communities, a phenomenon with which this Court is quite familiar, having recently dealt with cases raising this common practice. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources,* 504 U.S. ____, 112 S.Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. ____, 112 S.Ct. 2009 (1992).[1] Flow control is antithetical to these basic economic and environmental realities.

The driving force behind flow control is economic protectionism – a means of guaranteeing that waste disposal or processing facilities will receive sufficient solid waste to cover the costs of construction, operation and debt service, thus protecting a facility from competition with other economically and environmentally protective waste management options.

1. Indeed, this Court decided three cases during the term ending in June of 1992 involving waste disposal issues: *Fort Gratiot; Chemical Waste Management;* and *New York v. United States,* 504 U.S. ____, 112 S.Ct. 2408 (1992). This fact alone eloquently establishes this Court's recognition that waste generation and disposal are issues of paramount national concern.

Flow control is economically inefficient. It substitutes an extremely competitive waste services collection and disposal system with monopoly public regulations resulting in higher disposal costs. Flow control is really a hidden business tax because it subsidizes designated facilities with a guaranteed customer base thereby eliminating the incentives for cost control and fiscal accountability.

A recent study by a New York State public interest group found that at least 22 of New York's 62 counties have flow control, costing the residents in these counties 54% more to dispose of a ton of garbage than their neighbors in open-market counties. Flow costs, "Flow Control And The Cost To New York Taxpayers" (1993). Consider the following difference between free market prices and flow control prices as described in recent flow control litigation. *Waste Systems Corp. v. County of Martin, Minn.,* 985 F.2d 1381, 1387 (8th Cir. 1993) (flow controlled disposal cost $72 per ton vs. $30 per ton at a competitive facility); *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection,* 857 F.2d 913, 916 (3rd Cir. 1988) (flow controlled disposal cost $100 per ton vs. "approximately half" that of a competitive facility; *Containers Corp. of Carolina v. Mecklenburg County,* No. 92 CV-154-MV, Slip.Op. at 4 (W.D.N.C. June 14, 1992) (flow controlled disposal cost $37.50 per ton vs. $29.50 per ton at a competitive facility.

Flow control does not *ipso facto* result in the disposal of waste in a state-of-the-art, environmentally safe facility. Indeed, the case at bar is a ready example. The Town of Clarkstown enacted a flow control ordinance to support the operation of a transfer station which simply prepares waste for shipment to ultimate, permanent disposal facilities.

The NSWMA "Ohio Report" reveals that designation deprived waste generators of access to Best Available Technology ("BAT") landfills, even when these generators had previously used BAT facilities for disposal. Amazingly, 20 districts whose generators used a BAT landfill in 1991 failed to designate any BAT landfill in 1993, resulting in tens of thousands of tons of wastes being disposed of in facilities that are not "state-of-the-art". Ohio Report at 5.

Flow control may deny waste generators their preferred disposal facilities offering greater levels of service or environmental protection. Why is this important? Waste generators are responsible for ensuring proper management of their wastes, and they are liable for improper disposal. The legacy of problems from poorly constructed landfills of the past spurred not only modern engineering standards for solid waste landfills, but also efforts to supplement these standards or to go beyond them through extra design features and special waste-handling procedures. While the evolution toward state-of-the-art landfills is under way throughout the United States, some landfill owners and operators are already discovering markets in extra, add-on-services – special procedures for placement of wastes, monitoring of incoming truckloads of waste, and the like. Some landfills are being built to a higher level of environmental protection than current regulations require.

Long-term fear of liability is driving this market, creating a demand for specialization even among today's highly engineered landfills. While statistics are lacking on the extent of this demand, an example of the degree of concern is that some United States industrial waste generators send their non-hazardous wastes to hazardous waste facilities, paying a high premium, rather than to municipal landfills qualified to take the wastes, simply for peace of mind. Flow control eliminates this option.

Generators may want their wastes disposed at one or two facilities in order to minimize their potential Superfund liability. Under Superfund, a generator assumes potential liability for the entire clean-up at any disposal facility it uses if that site becomes polluted. Confining wastes to a single landfill is one strategy to reduce this long-term risk. Flow control hampers this risk reduction strategy.

In fact, most generators today – municipalities, businesses, institutions, industrial facilities – use various criteria to select appropriate landfills. Disposal charges (including taxes on top of the gate fees), environmentally protective features, allocation of risk, special operating or waste-handling procedures, proximity, and other factors play a role in the selection. Flow control interferes with the search for specialization.

Flow control also interferes with the rational, economic forces driving the market in solid wastes. After all, solid waste is an article of value. The newsprint, paper products, cardboard, plastic, aluminum, glass, and other constituent components of solid waste, whether separated after use, hauling, or upon disposal, each have value. The reuse and recovery of these components, encouraged by federal law, has increased the availability of sufficient, accessible quantities of these components. Entire industries have sprung up based solely upon the gathering, remanufacturing, and marketing of reused and recycled components of solid waste. None of these lines of commerce are naturally restricted by artificially created geographic boundaries. Indeed, market boundaries are a function of supply, demand, and technology. Thus, today's Washington Post, printed in Virginia, mailed to a subscriber in New Jersey, discarded in New York, and then separated and shipped to Massachusetts for remanufacture into newsprint, is purchased to print next month's editions of the Washington Post. This describes more than a stream of commerce – indeed, it represents a circle of commerce. There is no logic which justifies the erection of a flow control barrier to break this circle.

In spite of the ill effects of flow control, at least 29 states now expressly grant localities or state agencies the authority to adopt flow control regulations. Thus flow control has become an integral part of the regulation of solid wastes. Whereas last term this Court reaffirmed its decision in *City of Philadelphia* by striking down as "economic protectionism" two state statutory schemes restricting the importation of wastes across state and local lines in *Fort Gratiot, supra,* and *Chemical Waste Management, supra,* flow control is nothing more than attempts by states and local governments to capture additional revenues by unlawfully prohibiting the exportation of wastes across the same lines.

Whether justified by recourse to long term planning needs, assurance of raw materials for local facilities or other claimed bases, the fact remains that flow control constitutes economic protectionism, already proscribed by this Court as an "evil" whether it is the legislature's means or end. *City of Philadelphia, supra,* 437 U.S. at 624.

By focusing on Ohio's implementation of flow control, the economic inefficiencies and environmental detriments become dramatically apparent. Flow control in Ohio is implemented by 48 single or multi-county solid waste districts, each of which has the power and duty to designate solid waste transfer, recycling and disposal facilities. Upon designation, "no person shall deliver . . . any solid wastes generated within a . . . district to any solid waste . . . facility other than the facility designated in the solid waste management plan . . ." approved by the Ohio EPA. [Ohio Rev. Code Ann. §343.01(I)(2).] Pursuant to this flow control statute, the Solid Waste Authority of Central Ohio ("SWACO"), which includes the State Capital, Columbus, has enacted resolutions withholding designation of any out-of-district facilities, thereby compelling disposal of in-district generated solid waste at the landfill and incinerator located within the district. Contemporaneously, SWACO took over the operation of the incinerator, so that the Authority now owns and operates the sole waste disposal facilities remaining within the district. Not surprisingly, in the 3 months since the takeover by SWACO, the disposal fees at the incinerator and landfill have increased by 80%. Other disposal facilities are available in adjacent counties. Although each facility is state-of-the-art, and the disposal fees each charged were less than those charged by SWACO even before the 80% increase, no such facility was designated by SWACO.

Thus far, flow control in Ohio has drastically reduced commerce in solid wastes. In 1991, before designation, 3.7 million tons of Ohio generated wastes were disposed in districts other than the districts in which they were generated. In early 1993, after two-thirds of the district plans had been approved by the Ohio EPA, the number of inter-district movements of wastes had been cut by more than 75%. Ohio Report at 4. In 1991, a landfill located in the Logan District received wastes from generators in 20 distinct districts; yet, only 9 of the districts had designated this landfill in 1993. *Id.*[2] Eighteen districts have

2. This diminution is at some cost to the environment. Designation does not compel that the authority designate the best available technology landfill. Indeed, as previously stated, 20 districts whose generators had utilized a best available technology landfill in 1991 failed to designate any best available technology landfill in 1993. *Id.*, at 5.

designated only a single landfill. *Id.*, at 6. Should that landfill cease operation even for a day, no wastes may be lawfully disposed at any other facility.

Forcing a waste transporter or generator to dispose of waste at a designated facility, in a planning area where there are a number of facilities from which to choose, is no different from forcing a private business to rent office space in a building selected by a city, or a doctor to send patients to a hospital chosen by a municipality. Thus, it is no wonder that such a significant obstruction to interstate commerce runs afoul of this Court's Commerce Clause jurisprudence, as we now show.

B. LOGIC AND THIS COURT'S PRECEDENTS SUGGEST THAT FLOW CONTROL IS UNCONSTITUTIONAL

One might think that this Court itself has dealt the death knell to flow control, whether based on state or local enactments barring export within or beyond state lines. After all, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992), held unconstitutional a Michigan statute which precluded the in-county disposal of out-of-county and/or out-of-state generated solid wastes absent affirmative authorization by that County's Waste Management Plan, precisely because the waste import restrictions enabled each of Michigan's 83 counties "to isolate itself from the national economy." *Id.*, 112 S.Ct. at 2024. This Court found it made no difference that the Michigan enactment treated interstate and intrastate commerce even-handedly:

> "For . . . a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."

Id., 112 S.Ct. at 2024.

This Court subjected the Michigan enactment to strict scrutiny Commerce Clause analysis and, because the State could not identify any reason, apart from origin, to support the differential treatment of in-county versus out-of-county generated wastes, this Court deemed the statute facially violative of the Commerce Clause.

Obviously, neither this Court's language nor its rationale were restricted to devices affecting only the importation of solid wastes. Moreover, since this Court has held that federal statutes based upon the Commerce Clause, such as the anti-trust laws, as well as the Commerce Clause itself, reach exports as well as imports and to the same extent [*Pfizer, Inc. v. Gov. of India,* 434 U.S. 304 (1978), *reh. den.*, 435 U.S. 910 (1979); *Hughes v. Oklahoma,* 441 U.S. 322 (1979)], it would seem that the flow control death certificate need only be formally signed.

Not surprisingly, those federal courts which have considered whether *Fort Gratiot* strikes down state and local attempts to restrict the out-flow of solid wastes have deemed *Fort Gratiot* dispositive. *E.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir. 1993); *Government Suppliers Consolidating Serv. v. Bayh,* 975 F.2d 1267, 1277 n.8 (7th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 975 (1993); *Waste Recycling, Inc., et al. v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 (M.D. Ala. 1993).

Yet, respondent persists in perpetuating the unfounded notion that, despite *Fort Gratiot,* its ordinance precluding exportation of solid wastes beyond Township lines is somehow immune from Commerce Clause scrutiny. As set forth above, the development of entire industries based upon the collection and use of reusable and recyclable materials and the remanufacturing of them into components which are, themselves, articles in commerce, factually precludes localities from erecting an artificial wall to hoard the solid waste or its components for itself. When coupled with the regional and national markets for disposal of waste [*Fort Gratiot, supra,* 112 S.Ct. at 2023], it is transparently obvious that flow control necessarily impacts negatively on commerce, be that commerce defined as the solid

waste itself, its constituent elements, or the purchase of transportation or disposal services for solid waste. The law eradicating the underpinnings for the respondent's contention is set forth below.

C. THE DEFINITION OF COMMERCE FOR CONSTITUTIONAL PURPOSES IS THE SAME FOR THIS COURT AS IT IS FOR THE CONGRESS

As this Court has noted, the framers intended the Commerce Clause to cure the suppression of interstate commerce occurring under the Articles of Confederation. *Quill Corp. v. North Dakota,* ____ U.S. ____, 112 S.Ct. 1904, 1913 (1992). The Clause has been fairly characterized as "the Constitution's primary epoxy of national cohesion". Tribe, Lawrence N, American Constitutional Law (1988). This epoxy function is long standing.

In *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824), striking down New York's grant of an exclusive steamboat monopoly for navigation in New York waters, Chief Justice Marshall gave a broad reading to commerce under the Commerce Clause, concluding that the only commercial activities immune from federal power, and reserved for state or local regulation, were those "which are completely within a State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*, 22 U.S. (9 Wheat) at 194. Justice Marshall's broad view of commerce under the Commerce Clause was the basis for this Court's upholding the constitutionality of Title II of the Civil Rights Act, 42 U.S.C.A. §2000, *et seq,* precluding unequal enjoyment of places of public accommodation on the basis of race, color, religion, or national origin. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (since places of public accommodation use products which have moved in interstate commerce, the statute is within the Commerce Clause power). Similarly, in *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court applied Title II to "Ollie's Barbecue", a family owned restaurant in Birmingham, Alabama, because Ollie's had purchased meat from a supplier who had received it from out-of-state sources.

Thus, Chief Justice Marshall's view that the Commerce Clause contains an extraordinarily broad definition of commerce, reaching matters otherwise deemed local in nature, remains the law of the land.

This Court has determined that the same extraordinarily broad definition of commerce adheres to its decisions under the dormant Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), which held that solid wastes, excluding recyclables, were articles of commerce, also established that this Court's definition of commerce under the dormant Commerce Clause is no narrower than that of Congress in enacting legislation based upon that Clause. Before striking down New Jersey laws banning importation of solid and liquid wastes generated outside of the State (excluding from the ban separated waste materials intended for recycling), this Court noted that the New Jersey Supreme Court had expressed the view that there may be two definitions of commerce for constitutional purposes; a very sweeping concept of commerce when relied upon to support exertion of federal control or regulation, and a much more confined concept when used by the Courts to restrict state legislation. In rebuking this notion, this Court stated:

> "We think the State Court misread our cases, and thus erred in assuming that they require a two-tiered definition of commerce."

City of Philadelphia, supra, 437 U.S. at 622. Similarly, in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), which struck down on Commerce Clause grounds a state regulation restricting export of minnows, this Court yet again stated that there is but one definition of commerce, whether applied to federal enactments or the Court's utilization of its dormant powers:

> "*Philadelphia v. New Jersey,* 437 U.S. 617, 621-623 (1978), made clear that there is no 'two-tiered definition of commerce.' The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support the exertion of federal control or regulation."

Hughes, supra, 441 U.S. at 326 n.2.

Thus, whether dealing with solid wastes, minnows, or banking and related financial activities, which this Court has conceded are of "profound local concern" [*Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 38 (1980)], this Court has relied upon the broad expanse of the definition of commerce equally applicable to measure federal legislation and state enactments. Although burdens of persuasion and legislative presumptions may differ depending upon whether a federal or state statute is being reviewed, there can be no question but that the breadth of commerce subject to review pursuant to the Commerce Clause is identical, and includes acts, practices and articles which are in and of themselves profoundly local, but which are a part of a larger whole.

Since that power extends to Ollie's Barbecue and solid waste from which recyclables have been mined, a *fortiorari* the power extends to enactments barring the exportation of solid wastes, with or without its component parts, whether from states or geographic entities subsumed within them.

D. FLOW CONTROL OBLITERATES COMMERCE

There can be no doubt but that flow control, whether it is required or permitted by state law, and/or created or implemented by some locality, affects the stream of commerce. In *Goldfarb v. Virginia State Bar,* 421 U.S. 657 (1975), holding unconstitutional a minimum fee schedule for lawyer services in connection with local real estate sales, this Court had to first determine whether the challenged conduct affected interstate commerce, thereby falling within the jurisdiction of the Sherman Act, even though the legal services were performed wholly intrastate and were local in nature.

Because a significant portion of funds furnished for the purchasing of homes came from out-of-state, because loans on real estate were guaranteed by, among others, agencies of the United States, and because the services provided were a necessary component of the entire transaction, this Court found that the fee schedule was in the stream of interstate commerce:

> "The necessary connection between the interstate transactions and the restraint of trade provided by the

> minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, 'as a condition of making a loan, that the title to the property involved be examined. . . .' Thus a title examination is an integral part of an interstate transaction . . ."

Goldfarb, supra, 421 U.S. at 784.

Thus, in view of the volume of commerce involved and "the inseparability" of title examinations and searches from the interstate aspects of real estate transactions, this Court concluded that interstate commerce had been sufficiently affected. *Goldfarb, supra,* 421 U.S. at 785.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 231 (1980), vacating and remanding the dismissal of a civil Sherman Act complaint, plaintiffs had alleged a price-fixing conspiracy effectuated through an agreement to conform to a fixed rate of brokerage commissions on sales of residential property. Defendants had moved to dismiss, averring that the activities were local in nature and did not have a substantial effect on interstate commerce.

Based upon *Goldfarb,* the *McLain* Court determined that Sherman Act jurisdiction existed because, even were the brokerage activities local in nature, they had an effect on other appreciable activity demonstrably in interstate commerce, such as out-of-state purchasers and/or mortgage financing:

> "The facts of *Goldfarb* revealed an application of the State Bar Association's minimum-fee schedule to fix fees for attorneys' title examination services. Since the financing depended on a valid and insured title we concluded that title examination was 'an integral part' of the interstate transaction of obtaining financing for the purchase of residential property and, because of the 'inseparability' of the attorneys' services from the title examination process, we held that the legal services were in turn an 'integral part of an interstate transaction.' 421 U.S. at 784-785. By placing the *Goldfarb* holding on the available ground that the activities of the attorneys were within the stream of interstate commerce, Sherman Act jurisdiction was established. The *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce."

McLain, supra, 444 U.S. at 244. Reducing it to "a matter of practical economics", *McLain* concluded that the alleged price fixing "necessarily affected both the frequency and terms of residential sales transaction", thus being both in and affecting commerce:

> "Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce."

McLain, supra, 444 U.S. at 246.

In *F.T.C. v. Ticor Title Ins. Co.*, ____ U.S. ____, 112 S.Ct. 2169 (1992), no party even questioned whether an agreement to set fees for local title searches, examinations, and settlements affected commerce within the meaning of 15 U.S.C.A. §45(a)(1), supported by the Commerce Clause. Rather, the issue posed was whether the defendants had been conferred anti-trust immunity by the states.

In *Summit Health, Ltd. v. Pinhas,* ____ U.S. ____, 111 S.Ct. 1842 (1991), in which this Court held that a conspiracy to deprive a surgeon/opthamologist of operating privileges at a local hospital affected commerce because (1) some of the procedures were performed on out-of-state residents; (2) some of the revenues generated from the procedures came from out-of-state; and (3) some of the medications and supplies were purchased from out-of-state, no justice questioned whether the Commerce

Clause permitted Congress to reach such conduct; rather, the sole question was whether the Sherman Act had done so. *Id.*, at 1849.[3]

The cases that address the collection and disposal of solid wastes disclose the same Commerce Clause analysis. For example, in *J.P. Mascaro & Sons, Inc. v. Wm. J. O'Hara, Inc., et al.*, 565 F.2d 264 (3rd Cir. 1977), decided prior to *McLain*, the Third Circuit found jurisdiction over a private antitrust action due to the effect on commerce. Plaintiff claimed that defendants had conspired to exclude plaintiff trash hauler from a wholly intrastate market surrounding Philadelphia, Pennsylvania. At critical times, plaintiff had purchased equipment and supplies manufactured outside of its home state; paid out-of-state insurers substantial sums in premiums; and borrowed money from out-of-state lending institutions to finance its equipment purchasers. Several of Mascaro's customers paid for Mascaro's services through checks drawn from home offices located outside Pennsylvania. The Third Circuit found the proscribed effect on interstate commerce a matter of economic reality:

> "When the issue scrutinized is the effect on interstate commerce in an anti-trust context, economic reality must be the criterion. For example, to argue that commerce in interstate trucks is affected when the vehicles are shipped directly to the customer from the factory but not when they are purchased from the local dealer is economically unsound. . . . Here, it appears that the only local connection with the suppliers is the intervention of the vendor. That is not enough to stop the financial waves – not mere ripples

3. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) is not to the contrary. The Court there found that the Maryland statute barring ownership of both refineries and gas stations did not discriminate against commerce because it had "no demonstrable" effect on either the amount of the interstate commerce flowing into the state or the relative portions of local or out-of-state goods sold in-state. Id., at 126 and n.16. The statute affected only the structure of doing business in the state. Flow control demonstrably affects both the amount of interstate commerce and the portions of local and out-of-state goods sold in-state.

> – washing back in the stream of commerce to the out-of-state manufacturers."

Mascaro, supra, 565 F.2d at 268-269.[4]

In *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980), decided shortly after *McLain*, the Ninth Circuit vacated and remanded an action that had been dismissed for lack of subject matter jurisdiction under the Commerce Clause. Plaintiff had been engaged in the waste disposal business in the metropolitan Phoenix area, in competition with that of defendant. Plaintiff contended that defendant attempted to monopolize the waste disposal business through providing disposal services at prices substantially below cost.

The Court determined that each party acquired a substantial amount of its equipment from out-of-state; that some of the waste material collected by defendant "is paper which is hauled to paper brokers in Phoenix for shipment out-of-state"; and that defendant collected scrap wood which is shipped to recyclers, who then "make this material into wood chips which are shipped out-of-state". *Id.*, at 1096.

The Ninth Circuit determined that these facts established "not only that [defendant's] rubbish collection business substantially affected interstate commerce, but also that the alleged antitrust violations substantially affected interstate commerce." *Western Waste, supra*, 616 F.2d at 1097.

Respecting reuse, recycling, and line of commerce, the Ninth Circuit recited:

> "Universal hauls several tons of waste which it collects to paper brokers and recyclers that ship these materials out-of-state. This evidence also demonstrates Universal's effect on interstate commerce as these shipments were the beginning point for a significant line of interstate commerce. If Universal succeeds in its alleged scheme to drive Western Waste out of

4. *Accord, United States v. Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1583 (11th Cir. 1984), affirming Sherman Act convictions for price fixing and customer allocation in local market due to purchases from out-of-state vendors, and receipt and payment of funds from out-of-state.

> business, the number of suppliers from whom the dealers may purchase such scrap materials for out-of-state shipment will diminish. With fewer suppliers in the market, the suppliers of such scrap materials will be able to restrict supply and raise their prices with a concomitant reduction in the interstate commerce of such materials."

Western Waste, supra, 616 F.2d 1098.

Indeed, in deeming inapplicable earlier authority within the Circuit finding no Sherman Act jurisdiction arising from wholly local garbage disposal and container leasing businesses, supplied with equipment from out-of-state, *Western Waste* expressly relied upon the reuse and recycling which defendant undertook:

> "Universal hauls several tons of the waste which it collects to scrap dealers and paper brokers which ship these materials out-of-state."

Western Waste, supra, 616 F.2d at 1098.

Thus, whether viewed as the inception of a new line of commerce, or continuation of an old line of commerce, the chips, scraps, and other materials which constitute recyclables from solid wastes are in interstate commerce. They clearly are the building blocks of whole industries whose business is reuse and recycling. Even wholly intrastate collection and disposal of residential and commercial solid wastes are acts which are in the flow of interstate commerce and affect interstate commerce. Moreover, the source separation of residential and commercial wastes into reusable and recyclable components, and the remanufacturing of those waste materials, are both within the stream of interstate commerce and affect interstate commerce. Therefore, any restriction on the flow of this commerce effectuated by a state or locality's flow control presumptively discriminates against interstate commerce.

It should not be surprising that in *Diamond Waste, Inc. v. Monroe County, GA,* 796 F.Supp. 1511 (M.D. Ga. 1992), Chief Judge Owens, one month before *Fort Gratiot* and *Chemical Waste Management,* preliminarily enjoined defendants from

enforcing statutes and county ordinances which, plaintiff had claimed, burdened interstate commerce. The enactments had created a need for two distinct permits, a solid waste permit for disposal of in-state generated solid wastes, and a special solid waste permit for disposal of out-of-state generated solid wastes.

In enjoining enforcement of the special solid waste permit, Chief Judge Owens rebuked the defendant's contentions that the ordinance, applicable only to out-of-state generated wastes, did not implicate the Commerce Clause, by stating:

> "This argument fails for several reasons. First, solid waste disposal is a matter of national concern, . . . Thus, solid waste concerns interstate commerce.
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> * * *
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> Second, industries and other entities engaging in interstate commerce have to have a means of solid waste disposal. . . .
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> * * *
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> Third, the fact that DWI operates only within the State of Georgia does not mean that DWI is not a part of interstate commerce. . . . DWI primarily functions through contractual arrangements with waste transporters and waste generators. A portion of the waste deposited in the City landfill comes from recycling facilities. A recycling facility . . . collects recyclable materials from within and without Georgia. . . . The facility then processes these materials to separate the usable portion from the unusable . . . portion and disposes of the solid waste portion in the City landfill through a contract with DWI or with a DWI customer. DWI is a vital part of the recycling process."

Diamond Waste, supra, 796 F.Supp. at 1517. After all, Chief Judge Owens' conclusion is squarely based upon this Court's precedent.

E. FLOW CONTROL UNDERMINES THE PURPOSE SERVED BY THE COMMERCE CLAUSE

In the absence of federal legislation governing subjects of potential federal regulation, the subjects are open to control by state enactments so long as the states act within the restraints imposed by the Commerce Clause itself. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 623 (1978); *see, Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 440 (1977). The bounds of these restraints imposed by the Commerce Clause upon the state appear nowhere in the words of the Commerce Clause;[5] rather, they have emerged in decisions of this Court which strive to give effect to its basic, broad purpose. *City of Philadelphia, supra,* 437 U.S. at 623. *City of Philadelphia* deemed that broad purpose epitomized by the Opinion of Mr. Justice Jackson for the Court in *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 537-538 (1949):

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting custom barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig,* 294 U.S. 511, 527 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' "

City of Philadelphia, supra, 437 U.S. at 623.

City of Philadelphia noted that two separate tests have arisen under the dormant powers vested in the federal government by force of the Commerce Clause, one to deal with simple economic isolation, and the second to deal with credibly advanced legislative objectives lacking discrimination against interstate trade:

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5. Article I, Section 8, Clause 3 of the United States Constitution provides, in pertinent part: "The Congress shall have Power . . . to Regulate Commerce . . . among the Several States. . . ."

> "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. (Citations omitted.) The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders."

City of Philadelphia, supra, 437 U.S. at 624. Where other legislative objectives are *credibly* advanced, and there is no *patent* discrimination against interstate trade, *City of Philadelphia* acknowledged the adoption by the Court of a more flexible approach, whose general contours were outlined in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970):

> "Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

City of Philadelphia, supra, 437 U.S. at 624. Whatever test applies, nonetheless the central core of the dormant Commerce Clause is the preclusion of economic isolation through parochial legislation enacted by the states or their political subdivisions.

Any questions regarding the vitality of the *City of Philadelphia* decision have been dispelled by *Fort Gratiot* and *Chemical Waste Management, supra.*

In *Chemical Waste Management,* which struck down on Commerce Clause grounds an Alabama statute imposing an additional fee on in-state disposal of out-of-state generated waste, this Court expressly relied upon the rationale of *City of Philadelphia,* quoting at length from that Opinion before applying the *per se* test to the State's enactment. In so holding, this Court noted that the defenses advanced by the State: (1)

protection of health and safety; (2) conservation of the environment and natural resources; (3) provision of compensatory revenue to the State; and (4) reduction of flow of wastes travelling on State roads, were separately and together insufficient to overcome the discrimination against interstate commerce. *Chemical Waste Management, supra,* 112 S.Ct. at 2014-2015.

In *Fort Gratiot,* which struck down on Commerce Clause grounds a Michigan statute authorizing each county to preclude the disposal of out-of-state and out-of-county waste, this Court relied upon and quoted extensively from *City of Philadelphia* in applying the *per se* test to the State's facially neutral statute, reasoning that discrimination against commerce in out-of-state generated wastes is not eviscerated by equivalent discrimination against commerce in all out-of-county, but in-state generated wastes, relying on its decision to that effect in *Dean Milk Co. v. Madison,* 340 U.S. 349, 354 (1951):

> "The fact that the [*Dean Milk*] ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate plaintiff's burden on interstate commerce. As we noted, it was immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.
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> * * *
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> [A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."

Fort Gratiot, supra, 112 S.Ct. at 2024.[6]

6. The enactment struck down in *Dean Milk* was not a state statute. Rather, the enactment was a local ordinance passed by the City of Madison, Wisconsin. Thus, this Court makes no distinction between state statutes, local enactments enabled by state statutes, or local ordinances standing alone in analyzing Commerce Clause issues.

Moreover, as with *Chemical Waste Management* and *City of Philadelphia,* the State's assertions of need to conserve landfill disposal capacity, to plan for safe disposal of future wastes, and to protect health and welfare of citizens of the county and State, were deemed insubstantial to defeat the Commerce Clause challenge to Michigan's facially neutral statute.

Thus, the preclusion of economic isolation through state and local enactments remains the fulcrum of dormant Commerce Clause litigation.

F. IN COMMERCE CLAUSE CASES, THIS COURT HAS STRUCK DOWN THE JUSTIFICATIONS USED TO SUPPORT FLOW CONTROL

Just as federal enactments and this Court's opinions concerning disposal and transport of solid wastes rest soundly upon the Commerce Clause, state enactments, such as flow control, cannot exist in a vacuum, but must also be firmly bottomed upon state law. Respecting control over wastes, the state authority has generally been some expansive notion of exercise of the police power, in order to safeguard the health, safety, and welfare of its citizens. This Court has expressly limited the use of the police power in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management, supra,* given the absence of any proof that the wastes sought to be regulated are different in kind from those unregulated. In so holding, this Court has properly deemed the protection of the national economy paramount to the states' interests.

The localities seeking to benefit from flow control are clearly claiming no environmental or health degradation from solid waste disposal. Thus, such localities are left with no theoretical framework to justify the erection of a ban or imposition of a tax on exported solid wastes. Some have therefore begun to search for a framework, and have seized upon their "ownership" or "possession" of the solid waste, claiming it has been discarded by its residents of businesses. This claim has been raised, and lost, when measured against the Commerce Clause in other contexts. Its fate should be the same when applied to solid wastes.

In *Geer v. Connecticut*, 161 U.S. 519 (1896), over vigorous dissents of the first Justice Harlan and Justice Field, this Court sustained a Commerce Clause challenge against a Connecticut statute forbidding the transportation beyond the state of game birds lawfully killed within the state. The *Geer* Court reasoned that no interstate commerce was involved because the state, as representative of its citizens, owned the wild game so that it could qualify the ownership by precluding its removal:

> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."

Geer, supra, 161 U.S. at 530. Justices Field and Harlan dissented, viewing that upon an animal being killed for purposes of food or other uses of man "it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Id.*, at 609-610.

The view of the *Geer* dissenters became the law rather quickly. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255-256 (1911); *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598-600 (1923); *Foster Fountain Co. v. Haydel*, 278 U.S. 1, 10 (1928); *Toomer v. Whitsell*, 334 U.S. 385, 402 (1948); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-421 (1948); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Hughes v. Oklahoma, supra; South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99-100 (1984).

Of special significance to the embargo-flow control issue here posed is this Court's opinion in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), which struck down on dormant Commerce Clause grounds a state's directive due to its effect on both intra and interstate commerce, and not a claim to ownership. In *H.P. Hood*, an out-of-state corporation that purchased New York raw milk at three licensed New York State located receiving depots before transporting the milk to Boston, Massachusetts for processing, was denied a fourth license because another facility would "deprive local markets of a supply needed during the short season".

Noting that the challenged order proposed to limit the local purchase of additional milk to withhold milk from export, this Court determined that protection of local economic interests through assuring a local supply of raw milk violated the dormant Commerce Clause:

> "[H]ere the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause."

H.P. Hood, supra, 336 U.S. at 542.

The significance of *H.P. Hood* in applying the dormant Commerce Clause to intrastate preferences was clearly understood by Justice Black who, in his *H.P. Hood* dissent, characterized the question presented which had been answered in the negative by the majority of the Court as follows:

> "[W]hether the State can prefer the consumers of one community to consumers in another State as well as to consumers in other parts of its own territory."

H.P. Hood, supra, 336 U.S. at 575 (Black, J., dissenting Opinion).

Thus, this Court has already decided the converse of *Fort Gratiot*, holding that a state scheme granting local preferred rights of access to articles which may be shipped in commerce, but discriminates against others, both in-state and out-of-state, violates the dormant Commerce Clause.

Another opinion of this Court establishing invalidity of flow control is *Pike* itself, from which the *Pike* test is derived. In *Pike*, a state statute required that cantaloupes be packed in standard containers approved by a state official. Invoking his authority under the statute, the official issued an order prohibiting a grower from transporting his uncrated cantaloupes out-of-state for packing and processing. The grower challenged this order on Commerce Clause grounds.

The state contended that it imposed no burden upon interstate commerce because all that it regulated was the intrastate packing of goods. Interstate commerce, the state contended, began only when the articles were delivered to the interstate shipper. This Court rebuked this argument, noting that statutes expressly requiring that certain kinds of processing be done in the home state before shipment to a sister state had been "consistently invalidated by this Court under the Commerce Clause". *Pike, supra,* 397 U.S. 137, 142 (1970).

Having determined that the statute did affect commerce, the Court squarely addressed the dubious nature of flow control embargoes, stating:

> "[T]he Court has viewed with particular suspicion state statutes requiring business operation to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."

Pike, supra, 397 U.S. at 145 (citations omitted). *See Hughes v. Oklahoma, supra* (invalidating on Commerce Clause grounds state restriction on export of minnows).

Fort Gratiot is but the latest in a series of cases dooming flow control. Although *Fort Gratiot* dealt with the importation of out-of-county generated solid wastes, its significance to resolution of the flow control issues raised herein cannot be understated. Not only did *Fort Gratiot* itself determine that solid waste is part of the national stream of commerce, but also it held that a state statute permitting exclusion of out-of-county generated wastes was unconstitutional because it discriminated against interstate commerce. Even though couched in terms of the boundaries of a locality within the state, the fact that the state statute enabled the locality to equally adversely impact upon out-of-county and out-of-state solid wastes was deemed to constitute facial discrimination against out-of-state wastes, by adversely affecting them in relation to in-county generated wastes. Indeed, *Fort Gratiot* referred to this conundrum as provisions which "unambiguously discriminate against interstate

commerce", in concluding that the virtually *per se* rule of invalidity adhered to the statute. *Fort Gratiot, supra,* 112 S.Ct. at 2027.

Thus, logic and the law suggest that any attempt by a state or locality to restrict the stream of commerce in solid wastes by limiting or extinguishing the power to export those wastes from the state, or any of its political subdivisions, ought meet with a similar declaration of unconstitutionality on Commerce Clause grounds.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that flow control necessarily violates the dormant Commerce Clause because it interferes with the circle of commerce, and contradicts this Court's precedent and national policy as enunciated both by Congress and the Executive Branch. Flow control is economic protectionism which interferes with the natural, national free market in solid wastes. Therefore, NSWMA respectfully prays that this Honorable Court, in addition to reversing and remanding the Supreme Court, Appellate Division, Second Department of the State of New York, and declaring the ordinance of the Town of Clarkstown unconstitutional, also consider the broader issues posed by the 29 states which already have authorized the imposition of flow control, so this court's opinion can elucidate now the circle of commerce of solid wastes as set forth herein, thereby precluding the cluttering of this Court's docket with multiple petitions and appeals arising from the imposition of flow control.

Respectfully submitted

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